State v. Walker (Ashley)

No. 76743-2

Chambers, J. (concurring) — I concur in result because the officer had proper grounds to arrest. Ashley Walker's arrest was valid because when she showed the officer a marijuana pipe with visible residue on it, the officer had probable cause to believe that she was committing misdemeanor possession of marijuana in his presence. *See* RCW 69.50.4014; *State v. Hornaday*, 105 Wn.2d 120, 126, 713 P.2d 71 (1986) ("The question is whether the officer had probable cause to believe that a crime was being committed *in his presence*."). There is no minimum amount required to sustain a conviction for possession of controlled substances. *See State v. Malone*, 72 Wn. App. 429, 439, 864 P.2d 990 (1994). The residue alone may suffice. *State v. Williams*, 62 Wn. App. 748, 751, 815 P.2d 825 (1991). Although this was not the stated reason for her arrest, a misstatement at the time of the reason for the arrest is not automatically fatal to its validity. *See, e.g.*, *State v. Vangen*, 72 Wn.2d 548, 554, 433 P.2d 691 (1967); *State v. Huff*, 64 Wn. App. 641, 646, 826 P.2d 698 (1992).

I would, therefore, avoid the constitutional question because the issue of the validity of the arrest can be resolved on other grounds. *See Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 752, 49 P.3d 867 (2002). Since the majority has chosen to address the constitutional question, I write separately to express my concerns about the majority's conclusion that the legislature may validly create new exceptions to the misdemeanor arrest rule without any

meaningful review by this court.

Article I, section 7 of Washington's constitution protects the people of this state from searches and seizures without "authority of law." Const. art. I, § 7. With certain narrow exceptions, authority of law means a warrant. *State v. Ladson*, 138 Wn.2d 343, 349-50, 979 P.2d 833 (1999). The warrant requirement was intended to create a system in which, generally, the decision that an arrest or search is an appropriate exercise of governmental power will be made by a neutral and detached magistrate instead of by the officer engaged in the "often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 13-14, 68 S. Ct. 367, 92 L. Ed. 436 (1948). Because the court's holding today follows in the steps of others that have the potential to seriously erode that constitutional layer of protection, *cf. State ex rel. McDonald v. Whatcom County Dist. Court,* 92 Wn.2d 35, 38, 593 P.2d 546 (1979), I write separately to express some cautionary thoughts.

I agree with the majority that the legislature may grant police officers authority to arrest subject to constitutional limitations. Majority at 8. However, the exceptions to the general warrant requirement are of constitutional stature, and the legislature may not extend those exceptions beyond the limits of article I, section 7.

> "Except in the rarest of circumstances, the 'authority of law' required to justify a search pursuant to article I, section 7 consists of a valid search warrant or subpoena issued by a neutral magistrate. This court has never found that a statute requiring a procedure less than a search warrant or subpoena constitutes 'authority of law' justifying an

> intrusion into the 'private affairs' of its citizens. This defies the very nature of our constitutional scheme."

Ladson, 138 Wn.2d at 352 n.3 (quoting *In re Pers. Restraint of Maxfield,* 133 Wn.2d 332, 345-46, 945 P.2d 198 (1997) (Madsen, J., concurring)). *Accord United States v. United States District Court*, 407 U.S. 297, 317, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972) (warrant requirement under Fourth Amendment "accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government."). I would, therefore, hold that RCW 10.31.100(1) is unconstitutional insofar as it purports to authorize warrantless arrests for cannabis related misdemeanors even if not committed in the presence of an officer.

While the legislature may authorize courts to issue warrants, it may not dispense with the warrant requirement altogether. *Ladson*, 138 Wn.2d at 352. *See also State v. O'Neill*, 148 Wn.2d 564, 595, 62 P.3d 489 (2003) (Chambers, J., concurring). Nor may it unilaterally dispense with the requirement in specific situations by creating new statutory exceptions unrooted in the common law. *City of Seattle v. McCready*, 123 Wn.2d 260, 280 n.11, 868 P.2d 134 (1994) (rejecting the position that "a statute is categorically sufficient to provide the authority of law necessary to satisfy Const. art. 1, § 7").

Article I, section 7 "is declaratory of the common-law right of the citizen not to be subjected to search or seizure without warrant." *State v. Ringer*, 100 Wn.2d 686, 691, 674 P.2d 1240 (1983) (quoting *State v. McCollum*, 17 Wn.2d 85, 96,

136 P.2d 165, 141 P.2d 613 (1943) (Millard, J., dissenting)), *overruled in party by State v. Stroud,* 106 Wn.2d 144, 720 P.2d 436 (1986); *see also State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). This court has never approved any exception to that general rule except those based on "'well-established principles of common law.'" *Ladson*, 138 Wn.2d at 349-50 (quoting *McCready,* 123 Wn.2d at 273). Those exceptions are narrowly drawn. *See, e.g.*, *State v. Jones*, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002). I would hold that under article 1, section 7, exceptions to the warrant requirement must be firmly rooted in principles recognized in 1889 when our constitution was adopted. *See Ringer*, 100 Wn.2d at 690 ("In construing Const. art. 1, § 7 we look initially to its origins and to the law of search and seizure at the time our constitution was adopted.").

When article I, section 7 was adopted, the common law permitted warrantless arrests for a felony on probable cause and for misdemeanors committed in the presence of the officer. *Ringer*, 100 Wn.2d at 691; *see also* Charles W. Johnson, *Survey of Washington Search and Seizure Law: 2005 Update*, 28 Seattle U. L. Rev. 467, 591 (2005). The warrant requirement is designed to reduce the "dangers of unlimited and unreasonable arrests of persons who are not at the moment committing any crime." *Trupiano v. United States*, 334 U.S. 699, 705, 68 S. Ct. 1229, 92 L. Ed. 1663 (1948), *overruled in part on other grounds by United States v. Rabinowitz,* 339 U.S. 56, 70 S. Ct. 430, 94 L. Ed. 653 (1950). But in some circumstances, the public good of investigating, stopping, or preventing crime outweighs the risk to the individual of

erroneous arrest. In the case of felonies, the seriousness of the crime weighs more heavily on the side of the public good. *See, e.g.*, *Carroll v. United States*, 267 U.S. 132, 157, 45 S. Ct. 280, 69 L. Ed. 543 (1925) ("[T]he reason for arrest without warrant on a reliable report of a felony was because the public safety and the due apprehension of criminals charged with heinous offenses required that such arrests should be made at once without warrant.").

In the case of misdemeanors, the thumb is taken off the scale and the balance tips back in favor of requiring a warrant. *See Welsh v. Wisconsin*, 466 U.S. 740, 754 n.14, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984) ("[T]he penalty that may attach to any particular offense seems to provide the clearest and most consistent indication of the State's interest in arresting individuals suspected of committing that offense.").

When a misdemeanor is committed in the officer's presence, however, the risk of error is so decreased that the scale tips toward allowing immediate arrest. Although seriousness does not weigh on the side of the public need, the potential of unfair burden on an individual is greatly reduced. *See, e.g.*, *United States v. Watson*, 423 U.S. 411, 426-27 n.1, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976) (Powell, J., concurring) (observing that there is no reason to require a warrant where an offense is committed in the officer's presence; "such an arrest presents no danger that an innocent person might be ensnared, since the officer observes both the crime and the culprit with this own eyes."); *Trupiano*, 334 U.S. at 705 (The dangers of unlimited and unreasonable arrests "are not present where a

felony plainly occurs before the eyes of an officer of the law."); *Gramenos v. Jewel Cos.*, 797 F.2d 432, 441 (7th Cir. 1986) (Making certain that "the officer has seen the crime committed . . . greatly reduces the chance of mistaken arrest.").

When the misdemeanor constitutes a breach of the peace, the thumb comes down again on the side of the public good. A breach of the peace includes at the very least a "threat of violence." *See Atwater v. City of Lago Vista*, 532 U.S. 318, 328 n.2, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001). The reason for arrest for misdemeanors without warrant at common law was "promptly to suppress breaches of the peace." *See Carroll*, 267 U.S. at 157; William A. Schroeder, *Warrantless Arrests and the Fourth Amendment*, 58 Mo. L. Rev. 771, 789 (1993) ("English common law 'permitted immediate arrest of those committing or threatening to commit a breach of the peace in order to protect the people of the community from acts of violence.'" (quoting Edward C. Fisher, Laws of Arrest § 87, at 188 (1987)). Authorities are divided on whether, under the common law, warrantless arrests were permitted only for breaches of the peace committed in the presence of the officer, or whether breaches of the peace constituted an exception to the presence requirement. *See Atwater*, 532 U.S. 318. But there is no evidence of any exception to the presence requirement other than for breaches of the peace. *See id.*

The development of Washington law since adoption of article I, section 7 generally reflects this principle. Except for the relatively recent cannabis

exception,[1] most of the statutes creating exceptions to the misdemeanor arrest rule involve violence or the threat of violence to persons, animals, or property. *See, e.g.*, Laws of 1893, ch. XXVII, § 9 (permitting warrantless arrest for cruelty to various animals); Laws of 1969, 1st Ex. Sess., ch. 198, § 1 (physical harm or threat to property); RCW 10.31.100(2)(a) (violation of protection order); RCW 10.31.100(2)(a)-(c) (domestic violence).

I would hold that the statute permitting warrantless arrest for cannabis related misdemeanors not occurring in the officer's presence violates article I, section 7. The substantial risk of erroneous arrest exists because the alleged crime did not take place in the presence of the arresting officer. There was no breach of the peace because cannabis related crimes such as possession and use of marijuana are not violent crimes. *See State v. Ramirez*, 49 Wn. App. 814, 820-21, 746 P.2d 344 (1987).

I respectfully disagree with the majority's assertion that because the legislature can designate an offense as a felony or a misdemeanor, it must necessarily also have the power to determine the standards under which an arrest may occur. Punishment for a crime is a different matter altogether from arrest. Determining the punishment for a crime is clearly within the legislature's power. *See State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937) ("Fixing of penalties or punishments for criminal offenses is a legislative function, and the power of the legislature in that respect is plenary and subject only to

[1] The statute was first enacted in 1969. *See* Laws of 1969, Ex. Sess., ch. 198, § 1.

constitutional provisions against excessive fines and cruel and inhuman punishment.") (citing *State v. Duff,* 144 Iowa 142, 122 N.W. 829 (1909)). But arrest cannot be considered a penalty or a punishment because at the time of arrest, the detainee has not been convicted of any crime and is not subject to punishment. *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (punishment may be imposed only after formal adjudication). Arrest is the "quintessential seizure." *Atwater*, 532 U.S. at 360. It is not the legislature, but the constitution, as interpreted by the courts, that determines the scope of constitutional protections such as those against unreasonable seizure. *Ladson*, 138 Wn.2d at 352 n.3.

I would hold that the statute purporting to authorize Walker's warrantless arrest for a misdemeanor not committed in the presence of the officer and not constituting a breach of the peace, is unconstitutional. However, because Walker was validly arrested for misdemeanor possession of marijuana, committed in the presence of the officer, I concur in the result.

AUTHOR:
Justice Tom Chambers

WE CONCUR:

Justice Richard B. Sanders	Justice James M. Johnson